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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

Nos. 352 and 359.

BETTY LEVIN,
Petitioner,

v.

MISSISSIPPI RIVER FUEL CORPORATION, et al.,
Respondents.

ALLEGHANY CORPORATION, et al.,
Petitioners,

v.

MISSISSIPPI RIVER FUEL CORPORATION, et al.,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF IN OPPOSITION

On Behalf of Respondents Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson, C. D. Peet, John C. Bolinger, Jr., and James M. Kemper, Jr.

QUESTIONS PRESENTED.

The petitions for certiorari would seem to indicate that there is a misunderstanding as to just what the Court of Appeals decided. An examination of the opinion will show that it is an extremely thoughtful one in which the Court has set forth the arguments, pro and con, on the principal issues, and, instead of dogmatically announcing decisions as to which contentions were correct and which

false, has frankly indicated the difficulties and doubts so raised. However, instead, as petitioners suggest, of failing to resolve such doubts and failing to decide the issues as to the proper construction of the Articles of Incorporation of Missouri Pacific Railroad Company (MoPac), and of the applicable Missouri law, the Court did positively, flatly and finally state its conclusions and render its decisions on each of the basic issues in question in the following language (Alleghany Pet., Appendix B, pp. 33a-34a)*:

> "In summary, and in repetition: We hold that the proposed plan is one for a 'corporate consolidation' and that the parenthetical material of § 5 (11) is applicable. We conclude that a majority of all voting shares in the aggregate is the general standard and that the statute bows in the direction of state law only with its phrase beginning with 'unless'. We also conclude that chapter 351 has application to the proposed plan. But, while there are significant contrary arguments, we are not persuaded either (a) that MoPac's Articles call for a class vote on a consolidation, or (b) that, if they do, § 351.270, by its reference to the articles, demands a class vote, or (c) that, even if it does, class voting is something 'required under applicable State law'. In our view, the Class B shareholders must surmount each and all of these hurdles in order to prevail. We are not convinced that they have surmounted any of them."

When this language is examined in the light of the Court's own formulation of the questions presented to it, it will, we submit, show that the Court of Appeals made the following seven specific decisions, some of which petitioners challenge directly, some petitioners challenge only

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* References to the Petition for Certiorari in No. 352 filed by Betty Levin will be denoted "Levin Pet." and to the Petition in No. 359, filed by Alleghany Corporation, Rose Slayton, et al., as "Alleghany Pet.".

indirectly or by inference, and some are not challenged at all.

First, the Court of Appeals held that the proposed plan of consolidation is a plan for a factual "corporate consolidation" within the meaning of the Transportation Act of 1940, 49 U. S. C., §§ 5 (2) and 5 (11), regardless of the motives of the parties proposing it.

This decision is challenged directly by petitioner Levin (Levin Pet. pp. 15-21).

Second, the Court of Appeals held that under the provisions of § 5 (11) a majority of all voting shares in the aggregate is the general, or primary, standard set up by Congress for the vote of shareholders on a plan of merger or consolidation, and that the qualification "unless a different vote is required under applicable State law" is the exception.

This decision is challenged directly by petitioners Alleghany, et al. (Alleghany Pet. pp. 17-18).

Third, the Court of Appeals held that Chapter 351 of the Missouri Revised Statutes, 1959, not Chapter 388, has application to the proposed plan. Neither of the petitions questions this decision, but in the event certiorari should be granted, respondents will challenge it.

Fourth, the Court of Appeals held that MoPac's Articles do not call for a class vote on a consolidation.

This decision is not challenged by any of the petitioners, for petitioners realize that the Supreme Court will not undertake to give a second appellate review of the decision of one appellate court as to the correct construction of the language of a private document which is only of interest to the parties themselves, and the effect of which is limited to the particular case. However, it is this decision which goes to the very heart of petitioners' requests for certio-

rari and which must be reversed if their claim to the right of a class vote is to be sustained.

Fifth, the Court of Appeals held, by phrase (b) in the portion of its opinion quoted above, that Section 351.270, by its reference to the Articles of Incorporation of Mo. Pac does not demand a class vote. In other words, the Court of Appeals answered, in the negative, its own formulation (Alleghany Pet., Appendix B, p. 30a) of the *ultimate* issue as to whether Section 351.270 "operates to make any class voting provisions of MoPac's Articles applicable to a consolidation plan when the Missouri consolidation statute itself does not impose that requirement."

Again this decision is not challenged directly by any of the petitioners, for petitioners also realize that the Supreme Court will not undertake to review a decision of a Court of Appeals interpreting a State statute where such decision is one of first impression and is not in conflict with any decision of any Court of the State. However, this decision also goes to the very heart of petitioners' requests for certiorari, and is challenged, if challenged at all, only indirectly in the contention that the Court of Appeals declined to determine the applicable State law (Alleghany Pet. 3, 22-24; Levin Pet. 2, 24-26).

Sixth, the Court of Appeals held, by phrase (c) in the portion of its opinion quoted above, that even if it be assumed that Sections 351.425 and 351.270 do defer to MoPac's Articles as far as a consolidation is concerned, and even if it be further granted that MoPac's Articles call for a class vote on consolidation, and even if the Articles as such be held to be "state law", nevertheless, class voting is not "required" but merely permitted under that state law. If there be any possible doubt as to just what the Court of Appeals intended to decide and did decide by said phrase (c), it should be resolved by referring back to the question answered by said phrase (c).

The question as formulated by the Court (Alleghany Pet. Appendix B, p. 32a) was

> "If, however, it be assumed that § 351.425 and § 351.270 do defer to MoPac's Articles so far as a consolidation is concerned, and if it be further granted that MoPac's Articles call for a class vote on consolidation * * *"

and if the Articles as such be held by the Court to be "State law", then

> "is class voting then 'required' or merely permitted under that state law?"

This is the question which the Court of Appeals answered in the negative, and in so doing merely decided a question as to the proper construction of State statutes.

Once more this decision is not challenged directly by any of the petitioners. It is only attacked indirectly in the contentions (a) that the Court of Appeals decided the case according to Federal and not State law and incorrectly construed the Federal law (Alleghany Pet. 2, 12-16, 17-20; Levin Pet. 2-3, 22-28), and (b) that the Court of Appeals erred in disregarding what is alleged to have been the consistent construction of § 5 (11) by the Interstate Commerce Commission (Alleghany Pet. 4, 20-22, Appendix E; Levin Pet. 2-3, 27-28, Appendix C).

Immediately following its rendition of the foregoing decisions the Court of Appeals stated that in resolving any doubts which it had with respect to the proper construction of MoPac's Articles, and of the Missouri statutes, it was impressed with "the significance of the national transportation policy and its emphasis on railroad consolidation, with the stated exclusive and plenary character of § 5 (11), and with its consequent preemptive nature," and gave consideration to such national policy and federal statute in resolving its doubts. Although this was not, strictly speaking, a decision on any issue before it, nevertheless, petitioners challenge di-

rectly the propriety of the Court of Appeals taking these matters into consideration in resolving any such doubts (Alleghany Pet. pp. 18-20; Levin Pet. 24-28).

In addition to the above, the Court of Appeals rendered its decision on two other issues:

1. It held that any inconsistency in the positions which either of the parties plaintiff or parties defendant had taken in the past "to the extent it is present at all, is not of such dignity or surrounded with such circumstances as support either estoppel or res judicata." This decision is challenged directly by petitioner Levin (Levin Pet. pp. 29-35).

2. The Court of Appeals held that it was not bound by the District Court's conclusion upon a doubtful question of State law. This decision is challenged directly by petitioner Levin (Levin Pet. pp. 24-25).

Accordingly, it would seem that the questions presented, or indirectly presented, by these petitions for certiorari would be more correctly stated as set forth below, rather than as set forth in either or both of the two Petitions:

1. Whether or not the Court of Appeals correctly decided that the proposed plan for the consolidation of Missouri Pacific Railroad Company and The Texas and Pacific Railway Company into a new corporation is one for a "corporate consolidation" within the meaning of § 5 (11) of the Transportation Act of 1940, 49 U. S. C., Section 1, et seq.?

2. Whether or not the Court of Appeals correctly construed the parenthetical clause in § 5 (11) of said Act as setting up a majority vote as the general standard or rule, and such different vote as may be required by State law as the exception?

3. Whether or not the Court of Appeals correctly construed the language of MoPac's Articles of Incorporation

as not providing for a class vote on a consolidation such as the one embodied in the proposed plan?

4. Whether or not the Court of Appeals correctly decided that Section 351.270, Missouri Revised Statutes 1959, by its reference to the articles does not operate to make any class voting provisions of MoPac's Articles applicable to a consolidation plan when the Missouri consolidation statute itself does not impose that requirement.

5. Whether or not the Court of Appeals correctly decided that even if it be assumed that Sections 351.425 and 351.270 do defer to MoPac's Articles as far as a consolidation is concerned, and even if it be further granted that MoPac's Articles call for a class vote on consolidation, and if the Articles as such be held to be "state law", nevertheless, class voting is not "required" but merely permitted under that State law.

6. Whether or not it was proper for the Court of Appeals to take the significance of the national transportation policy and its emphasis on railroad consolidation, with the stated exclusive and plenary character of § 5 (11), and with its consequent preemptive nature, into consideration in resolving any doubts which it had with respect to the proper construction of MoPac's Articles and Sections 351.055 (3), 351.425 and 351.270, Missouri Revised Statutes, 1959?

7. Whether or not the Court of Appeals correctly decided that any inconsistency with the positions which either the parties plaintiff or parties defendant had taken in the past "to the extent it is present at all, is not of such dignity or surrounded with such circumstances as support either estoppel or res judicata"?

8. Whether or not the Court of Appeals correctly decided that it was not bound by the District Court's conclusion upon a doubtful question of State law?

ARGUMENT.

We do not deem it necessary to answer the allegations, particularly those contained in the Levin petition, with respect to the purported gross inequities in the proposed plan and the evils which will follow if certiorari is not granted and the decision of the Court of Appeals is not reversed. These matters, as the Court of Appeals has correctly pointed out, are peculiarly within the jurisdiction of the Interstate Commerce Commission and we suggest that it may be safely assumed that the Commission will not approve the plan unless it is found to be "just and reasonable".

Likewise, we do not deem it necessary to attempt to answer, in detail, all of the allegations in the Levin petition to the effect that a Pandora's box will be opened if the Court of Appeals' decision stands, and that neither the Courts, the Interstate Commerce Commission, or the parties will know what votes will be required in other railroad mergers and consolidations. The fact is, of course, that any questions which may arise with respect to voting rights in any other railroad mergers or consolidations will have to be answered on a case by case basis, according to the particular facts and the applicable State law in each case, and not according to the language embodied in the MoPac Articles read in the light of the statutes of the State of Missouri.

In this connection it is necessary, as we have attempted to indicate above, to examine carefully into just what the Court of Appeals did and did not decide. The petitions for certiorari attempt to make it appear that important questions of Federal law have been decided which, because of their claimed effect upon future railroad consolidations and mergers, have not been, but should be, settled by the Supreme Court. For this reason the questions

which petitioners say are presented by these petitions have been cast in the mold of such Federal questions. But actually, with the exceptions specifically mentioned below, the basic issues decided by the Court of Appeals were much narrower and merely involved questions as to the proper construction of the language of a private contract and of certain statutes of the State of Missouri.

Accordingly, we will discuss seriatim the questions which seem to these respondents actually to be presented by the decision(s) of the Court of Appeals, as listed above, and in doing so will indicate, by cross-references, our answers to the respective Questions Presented and Reasons for Granting the Writ asserted by the petitioners.

I.

The Court of Appeals correctly decided that the proposed plan is one for a "corporate consolidation" within the meaning of § 5 (11) of the National Transportation Act of 1940, 49 U. S. C., § 1, et seq.

Petitioner Levin (Levin Pet. 2, 3, 15-21) contends that this decision is in conflict with the decisions of this Court in *County of Marin v. United States*, 356 U. S. 412, because the alleged motive or purpose of the proponents of the plan is to destroy the valuable rights of the Class B stock and enrich the controlling holder of the Class A stock. For that reason, petitioner says that the fact that the proposed plan is actually a consolidation should be ignored.

There is no conflict with *County of Marin*. As the Court of Appeals properly pointed out, *County of Marin* actually held that the Commission did not have jurisdiction of the proposed transaction there in issue because it was not, in fact, an "acquisition" but was in fact a "split up". This Court did not there undertake to examine into or decide any question as to whether or not the purpose or motive

behind the transaction was an improper one, as petitioner Levin asks the Court to do here. For further answer to this contention of petitioner Levin see the Brief for Missouri Pacific in Opposition, pages 24, et seq.

II.

The Court of Appeals correctly construed the parenthetical clause in § 5 (11) of the National Transportation Act of 1940 as setting up a majority vote as the general standard or rule, and such different vote as may be required by State law as the exception.

The language of the statute is clear and it is difficult to see how any other construction could be placed upon it than that of the Court of Appeals. Webster's New International Dictionary, Second Edition, Unabridged, defines "unless" as "Except; excepting;". Hence the qualification with respect to applicable State law is obviously intended to be an exception to the general rule (with respect to a majority vote) previously promulgated.

III.

The Court of Appeals correctly construed the language of MoPac's Articles of Incorporation as not providing for a class vote on a consolidation such as the one embodied in the proposed plan.

As indicated above, petitioners do not challenge the correctness of this decision, nor do they claim this decision as a ground for the granting of the writ.

And yet petitioners cannot in any event prevail in their contention that they are entitled to class vote unless the Articles be construed as calling for one, and, as far as the ultimate result (the reversal of the judgment below) was concerned, the Court of Appeals might have

ended its opinion with this decision. Without a provision in the Articles calling for a class vote on mergers and consolidations such as the one proposed, Section 351.270 can not come into play, even if that section were construed contrary to the decision of the Court of Appeals. And if the Articles do not require a class vote, under no circumstances can it be held that a class vote is "required under applicable State law."

Since this decision is not challenged, since this Court has made it clear, not only in Rule 19 itself, but in statements of distinguished former members of the Court[1] and in reported decisions[2] that its writ will not be issued to review such matters, and since this point has been fully covered in the Brief for Missouri Pacific, pp. 15-16, we will not here undertake to demonstrate the correctness of the construction which the Court of Appeals placed upon this language.

IV.

The Court of Appeals correctly held that Section 351.270, by its reference to the articles, does not operate to make any class voting provisions of MoPac's Articles applicable to a consolidation plan when the Missouri consolidation statute itself does not impose that requirement.

Again petitioners do not challenge the correctness of this decision, nor do they claim this decision as a ground for the granting of the writ. And if this decision construing this section of the Missouri statutes be not reversed, then under no circumstances can it be held that a class vote is "required under applicable State law."

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[1] Mr. Chief Justice Hughes, 20 ABAJ 341; Mr. Chief Justice Vinson, 69 Sup. Ct. v, vi.

[2] *Dick v. New York Life Insurance Co.*, 359 U. S. 437, Mr. Justice Frankfurter dissenting, 457-458 (1959); *Rice v. Sioux City Cemetery*, 349 U. S. 70 (1955); *Magnum Import Co. v. Coty*, 262 U. S. 159, 163 (1923).

Petitioners are, presumably, aware of the fact that this Court has held that in the absence of a pronouncement upon state law by the Courts of that state, the federal appellate courts are justified in making their own determination of what the highest state court would probably rule in a similar case,[3] and that in dealing with issues of state or local law it will not ordinarily disturb the determination of a Court of Appeals on such questions.[4]

In *Propper v. Clark*, 337 U. S. 472, 487 (1949), the Court of Appeals for the Second Circuit had been faced with the problem of interpreting several sections of the New York receivership law where the precise issue had never been decided in the New York courts. This Court said that "the statutory language is easily susceptible of varying interpretations," and held that since the interpretation of the Appellate Court was not unreasonable, it would be accepted as correct.

Petitioners attack and seek to ignore this decision by charging that the Court of Appeals failed to make it. Thus Alleghany, et al. pose as the second of their Questions Presented the question as to whether or not the Court of Appeals erred in "declining to determine and apply so much of the applicable State law as it considered not 'clearcut, free-from-doubt and positive' concerning the stockholder vote required to approve a railroad consolidation" (Alleghany Pet., p. 2), and cite as one of the alleged errors below "The Error of Declining to Determine the Applicable Law" (Alleghany Pet., pp. 22-24). The same contention is made by Levin (Levin Pet., pp. 2, 24-26).

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[3] *King v. Order of Travelers*, 333 U. S. 153, 161 (1948).

[4] *Richards v. United States*, 369 U. S. 1 (1962); *United States v. Durham Lumber Co.*, 363 U. S. 522 (1960); *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U. S. 525 (1958).

The fact is, of course, that the Court of Appeals did not decline to determine the applicable State law. On the contrary, as pointed out above, while the Court indicated that the issue was not entirely free from doubt, it did resolve those doubts by the express and positive conclusions indicated above. It is true that, as the Court of Appeals expressly pointed out, in resolving such doubts it took into consideration "the national transportation policy" together with "the stated exclusive and plenary character of § 5 (11)." But these matters were merely aids to the Court's decision—reasons which influenced the Court in making the decision as it did. The decision itself was *not* that the national transportation policy did not require a class vote nor that § 5 (11) itself did *not* require a class vote (although respondents contend that should have been the decision). The decision was that applicable State law did not require a class vote. Such decision was not only correct, as pointed out in the Brief of Missouri Pacific, pages 17-19, but, even if it were incorrect, it is not the type of decision calling for the issuance of the writ.

V.

The Court of Appeals correctly held that even if it be assumed that Sections 351.425 and 351.270 do defer to MoPac's Articles so far as a consolidation is concerned, and even if it be further granted that MoPac's Articles call for a class vote on consolidation, and if the Articles as such be held to be "state law", nevertheless class voting is not "required" but merely permitted under that State law.

This decision likewise is not challenged directly by any of the petitioners, nor do they claim this decision as a ground for the granting of the writ, presumably for the same reason that they do not challenge the cor-

rectness of the preceding decisions. Likewise, since this is merely a decision construing sections of the Missouri statutes, we do not deem it necessary to discuss here the correctness of the decision as such. However, petitioners may be said to attack it indirectly by two contentions.

First, the contention is made that the Court of Appeals decided the case according to Federal and not State law, and incorrectly construed the Federal law (Alleghany Pet. 2, 12-16, 17-20; Levin Pet. 2-3, 22-28). But the fact is, as pointed out above, that while the Court of Appeals did look to Federal policy and Federal law to aid it in resolving its doubts with respect to certain of the basic issues before it, nevertheless, those issues themselves presented questions with respect to the construction of a private contract and of applicable State statutes. And having resolved such doubts the Court's decisions on such basis issues were decisions on matters of private contract and State law and not of Federal law. Thus, its decision on the basic proposition that the Articles of Incorporation of MoPac do not call for a class vote is a decision on a matter of private contract, its decision that § 351.270 of the Missouri statutes by its reference to the Articles does not call for a class vote, and its decision that even if the Articles of Incorporation and § 351.270 together call for class voting, nevertheless, class voting is not required but only permitted under applicable State law, are, in each case, not decisions with respect to Federal law.[5]

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[5] There was an issue of Federal law directly presented to the Court of Appeals but not decided by it. That was the contention by the respondents that pursuant to the precise language of § 5 (11) the only different vote which might be required under applicable State law was a different vote with respect to the "number" of votes, not the "kind" of votes, which might be required by applicable State law, and even though a State law might not merely permit but require a class vote, such requirements would not come within the exception in § 5 (11) which recognizes only a State law

As for the contention that the Court of Appeals incorrectly construed Federal law, Alleghany says (Alleghany Pet. 18-20) that the Court misconstrued the "national transportation policy", the decision of this Court in *Schwabacher v. United States*, 334 U. S. 182, and erred in bottoming its decision foursquare on § 5 (11). But the Court of Appeals' construction of the national transportation policy is precisely the construction which has been given by this Court in the series of decisions cited by the Court of Appeals.[6] With respect to *Schwabacher* the Court of Appeals merely cited the language of this Court in *Schwabacher*, and has certainly not misconstrued that case.

With respect to § 5 (11), as we have pointed out above, the Court of Appeals was merely looking to § 5 (11), with its stated exclusive and plenary character and consequent preemptive nature, along with the national transportation policy as interpreted by this Court, all of which indicate that it was the intention of Congress to encourage and facilitate mergers and consolidations of railroads, as an aid to resolve such doubts as it had with respect to the proper construction of the language in the MoPac Articles of Incorporation and the provisions of certain Missouri statutes.

The reference in the Court of Appeals' opinion to the District Court quoted on page 18 of the Alleghany petition, is, we submit, misconstrued by petitioners. The District Court did not interpret § 5 (11) differently than

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requirement for a greater "number" than a majority. But since the Court of Appeals did not decide that issue, that question is not presented to this Court on these petitions for certiorari.

[6] *County of Marin v. United States*, 356 U. S. 412, 417 (1958); *Schaffer Transp. Co. v. United States*, 355 U. S. 83, 87-88 (1957); *St. Joe Paper Co. v. Atlantic C. L. R. R.*, 347 U. S. 298, 305, and Appendix pp. 315-321 (1954); *Schwabacher v. United States*, 334 U. S. 182, 191-193 (1948).

the Court of Appeals did. On the contrary, it did not interpret or construe § 5 (11) at all. It merely quoted a portion of the parenthetical phrase in § 5 (11) (Alleghany Pet. 41a) and did nothing more. The difference between the Court of Appeals and the District Court is that where the District Court gave no effect or consideration to the national transportation policy, to § 5 (11), or to any other aspect of the Federal law, and merely attempted to construe the language of MoPac's Articles in a vacuum, so to speak, and made what the Court of Appeals called only an "unembellished reference to § 351.270", the Court of Appeals took such national transportation policy and § 5 (11) into consideration as an aid to the proper construction of the language of MoPac's Articles and of the Missouri statutes. And it was right and proper that it should do so, as pointed out below.

Levin says (Levin Pet. 22) that "Indeed, the Court below erroneously construed Section 5 (11) as if there were no applicable State law." But this is manifestly incorrect. The Court of Appeals did determine the applicable State law and only construed, and correctly construed, § 5 (11) to the limited extent of holding that it (a) provides for a majority vote as the general standard and a different vote required under applicable State law as the exception; (b) has a stated exclusive and plenary character and consequent preemptive nature; and (c) uses the word "required" in the sense of "mandatory" and not as merely permissive.

With respect to (a) no comment in addition to that made above would seem to be required.

With respect to (b) Section 5 (11) speaks for itself.

With respect to (c), many decisions of the Federal and State Courts might be cited in addition to those cited by the Court of Appeals. But this Court has had occasion to

consider the meaning of the phrase "required by statute"[7] and "required by law"[8].

Second, this decision is attacked indirectly by the contention that the Court of Appeals erred in disregarding what is alleged to be the consistent construction of § 5 (11) by the Interstate Commerce Commission, which is merely another way of saying that the Court incorrectly construed the Federal law. (Alleghany Pet. 4, 20-22, Appendix E; Levin Pet. 2-3, 27-28, Appendix C.)

For answer to this contention we adopt that portion of the Argument set forth on Pages 22-24 of the Missouri Pacific's Brief in Opposition, with the following addition:

Alleghany cites (Alleghany Pet. 20) the Report of the Hearing Examiner in Missouri Pac. Control of Chicago & E. Ill., I. C. C. F. D. No. 21775, in support of the proposition that the Commission has consistently required a showing of approval by a class vote where this was required either by State statute or the carrier's charter. Not only, as pointed out in the Missouri Pacific's Brief, has the Commission made no such requirement, but neither the Hearing Examiner nor the Commission so held. In that proceeding it was contended, by opponents of MoPac, that MoPac had unlawfully acquired control of the C. & E. I. by reason of the acquisition without prior Commission approval of a block of securities sufficient to give it a veto power over certain matters. MoPac denied that it had acquired control. The Commission ruled in favor of MoPac; petitions to reopen were filed and denied; and an appeal was taken to a three-judge Federal Court, which rendered its decision August 4,

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[7] *Wong Yang Sung v. McGrath*, 339 U. S. 33, 48, 51 (1949).

[8] *Helvering v. Illinois Ins. Co.*, 299 U. S. 88, 90 (1936); *Maryland Casualty Co. v. United States*, 251 U. S. 342, 348-349 (1919).

1966.[9] In that decision the Court pointed out, page 31, that "The Commission, with all of these facts before it, found that MoPac had not 'acquired control of Eastern through the trusts or otherwise' ". (Emphasis ours.)

VI.

It was proper for the Court of Appeals to take the significance of the national transportation policy and its emphasis on railroad consolidation, with the stated exclusive and plenary character of § 5 (11), and with its consequent preemptive nature, into consideration in resolving any doubts which it had with respect to the proper construction of MoPac's Articles and Sections 351.055 (3), 351.425 and 351.270, Missouri Revised Statutes, 1959.

It was eminently proper for the Court of Appeals to take the national transportation policy, as expressed in Federal statutes interpreted by this Court, into consideration in resolving its doubts.

One of the principal contentions made by respondents before the Court of Appeals was that the particular provisions of MoPac's Articles involved in this litigation arose out of the Reorganization Proceedings of the Missouri Pacific and that an examination of the published reports of the Interstate Commerce Commission and decisions of the Courts in such proceedings would demonstrate that such Articles could not have been intended by the Commission, the Courts, or the parties, to provide for a class vote on a plan of merger or consolidation, because public policy would have prohibited giving to the holders of the Class B stock, and more specifically to a single

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[9] *Illinois Central Railroad Company, et al. v. United States of America, et al.*, No. 65 C 1393, District Court, Northern District of Illinois.

stockholder, Alleghany, a veto power such as they assert, which could be used to frustrate such national policy. It was in response to this contention that the Court of Appeals did take the national transportation policy as expressed in the Transportation Act of 1940, and as contained in § 5 (11), all as interpreted by the decisions of this Court, into consideration in resolving its doubts as to the proper construction of the language in the MoPac's Articles.

By the same token, it was eminently proper for the Court of Appeals to take such national policy into consideration as an aid to resolve any doubts which it had with respect to the proper construction of the applicable State statutes, to consider whether or not Congress would have deferred to any State law which would tend to frustrate and obstruct the carrying out of such policy.

Furthermore, the statement by the Court of Appeals that it had taken the national transportation policy into consideration in arriving at its decisions was merely a statement of one of the reasons which caused the Court of Appeals to make the decisions which it did, and not a statement of the decisions themselves.

It is familiar doctrine that an appellate court is not concerned with the correctness of the reasons given by a Court below for its decision, but only with the correctness of the decision; that if a decision below is correct it will be affirmed even though the Court may have given a wrong reason therefor. This Court consistently recognizes and follows that rule.[10]

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[10] *Brown v. Allen*, 344 U. S. 443, 459 (1952); *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 88 (1943); *Riley Co. v. Commissioner*, 311 U. S. 55, 59 (1940); *Helvering v. Gowran*, 302 U. S. 238, 245 (1937); *United States v. Holt State Bank*, 270 U. S. 49, 56 (1926).

VII.

The Court of Appeals correctly decided that any inconsistency with the positions which either the parties plaintiff or parties defendant had taken in the past "to the extent it is present at all, is not of such dignity or surrounded with such circumstances as to support either estoppel or res judicata."

The attack upon this decision of the Court of Appeals (Levin Pet. 29-35) is completely answered in Footnote 30, pages 24-25, of the Missouri Pacific's Brief in Opposition which we adopt.

VIII.

The Court of Appeals correctly decided that it was not bound by the District Court's conclusion upon a doubtful question of State law.

Petitioner Levin says (Levin Pet. p. 24) that "The decision of the District Court was clear and equivocal, expressing no doubt at all as to the charter or the applicable Missouri law," and contends that therefore the Court of Appeals was bound by its policy to give special weight to a District Judge's decision on a matter of applicable state law. But petitioner has overlooked the fact that here the District Judge certified the case under 28 U. S. C. 1292 (b), and that petitioner did not oppose such certification. The Court said (Record 103):

> "The Court is of the opinion and therefore finds that the said order involves a controlling question of la[illegible]s *to which there is a substantial ground for difference of opinion* * * *. The motion of defendants [for certification] is not opposed by plaintiffs * * *." (Emphasis ours.)

The District Judge's decision as to the proper construction of MoPac's Articles involved nothing peculiar to

Missouri law and Section 351.270 had never been construed by a Missouri Court. Accordingly, he was in no better position than any of the three Circuit Judges to construe such Articles or statute.

CONCLUSION.

For the reasons outlined above, we submit that the writ should be denied.

Respectfully submitted,

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